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Tuesday 17 January 2006

Journal des débats (Hansard)

Mardi 17 janvier 2006

Standing committee on general government

Family Statute Law
Amendment Act, 2006

Comité permanent des affaires gouvernementales

Loi de 2006 modifiant des lois
en ce qui concerne
des questions familiales

Chair: Linda Jeffrey
Clerk: Tonia Grannum

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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON GENERAL GOVERNMENT

COMITÉ PERMANENT DES AFFAIRES GOUVERNEMENTALES

Tuesday 17 January 2006

Mardi 17 janvier 2006

The committee met at 1000 in room 151.

FAMILY STATUTE LAW AMENDMENT ACT, 2006

LOI DE 2006 MODIFIANT DES LOIS EN CE QUI CONCERNE DES QUESTIONS FAMILIALES

Consideration of Bill 27, An Act to amend the Arbitration Act, 1991, the Child and Family Services Act and the Family Law Act in connection with family arbitration and related matters, and to amend the Children's Law Reform Act in connection with the matters to be considered by the court in dealing with applications for custody and access / Projet de loi 27, Loi modifiant la Loi de 1991 sur l'arbitrage, la Loi sur les services à l'enfance et à la famille et la Loi sur le droit de la famille en ce qui concerne l'arbitrage familial et des questions connexes et modifiant la Loi portant réforme du droit de l'enfance en ce qui concerne les questions que doit prendre en considération le tribunal qui traite des requêtes en vue d'obtenir la garde et le droit de visite.

VA'AD HARABONIM OF TORONTO COUNCIL OF ORTHODOX RABBIS OF TORONTO

The Chair (Mrs. Linda Jeffrey): Good morning. The standing committee on general government is called to order. We're here today to continue public hearings on Bill 27, the Family Statute Law Amendment Act, 2006. Our first delegation, Va'ad Harabonim of Toronto, welcome. We appreciate your being here this morning. If you are going to speak this morning, identify yourselves and the organization you speak for. When you do begin, you'll have 30 minutes. If you leave time at the end, there will be an opportunity for us to ask questions about your delegation.

Mr. John Syrtash: Thank you very much. My name is John Syrtash. I'm a lawyer and partner with the firm of Beard Winter. I represent the Va'ad Harabonim of Toronto, which is the council of Orthodox rabbis of Ontario and Toronto. I'm here with two rabbis. Rabbi Mordechai Ochs, the chief judge of the Jewish court for divorce of Ontario, is sitting to my left. He'll be speaking, and will also be saying a few words in addition to myself. To my right is Rabbi Reuven Tradburks, clerk of the rabbinical courts of Ontario. He'll be here to answer some questions after my presentation.

I will also be here on behalf of organizations supporting the rabbinical courts. These include: the Agudath Israel, Ontario division; the Mizrachi Organization of Canada; the Emunah Women of Canada, which is an Orthodox Jewish women's group; the Lubavitch of Southern Ontario; and the Orthodox Union, Canada region. I can safely say that, by and large, we are representing in effect the entire organized Orthodox Jewish community of Ontario for the purposes of our presentation today.

I should tell you what I have handed out, first of all. The rabbinical council and these supporting organizations are here to tell you, based on the letter that we presented to this committee and to the Premier, and also in an information sheet that I've given to all of you—I handed out a letter of December 13, 2005, which I believe you may have read, hopefully, an information sheet that answers a question pertaining to how the rabbinical courts deal with Ontario law currently in dealing with family law, and an article I have written for the Lawyers Weekly critiquing the Family Statute Law Amendment Act. I've been a family lawyer for 25 years, dealing with the Jewish courts, and that deals with a critique on that act. You should know what's in front of you.

Basically, what our letter has said, what we're here to tell you, is that the rabbinical courts and the entire Orthodox community unanimously protest and strongly object to the Ontario government's attempt to enact this bill. Bill 27 was introduced to restrict family arbitration to a process "conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction." The stated intent of the bill is to ensure that the Superior Court would no longer be permitted to enforce a ruling of a family law arbitrator if it was based on any other legal system. Such other systems in Ontario historically—and I say "historically"—have been almost exclusively Jewish law as applied in arbitrations conducted by Ontario Jewish courts, freely chosen by Jewish spouses who have approached our rabbinical council.

The Jewish court in Ontario, and in every other common law jurisdiction worldwide, has had the historic right to have its family law/inheritance rules enforced by the courts for over 130 years without any problems or concerns. This is a right Jews will continue to have in

other common law jurisdictions, such as other common law Canadian provinces, the United Kingdom, the United States and Australia—everywhere on earth but Ontario.

Marion Boyd, the former Attorney General who was appointed by your own government to advise you on this, was basically appointed to look into this matter and, after exhaustive legal research and hearings that were broad-based, and after hearing countless submissions, in a formal report concluded that there was not a single Ontario court case that enforced a religious court decision—basically meaning a Jewish court ruling, because those are the ones that have come before the courts—that has once breached or offended any Ontario law or public policy. No evidence of any such breach was found since enforcement of religious arbitration came into effect in Ontario in 1897, following the English Act of 1889. It was then that such powers of enforcement were granted to religious courts in this province.

To us, it's absolutely shocking that this Legislature would have such—I hate to use the word—contempt for its own legal system that it would consider legislation when there is no evidence for the need to ban the enforcement of religious family law arbitration with such a fine tradition, based on the findings of its own investigator, a former Attorney General and a woman who has a feminist background. We therefore agree with Ms. Boyd when she made it clear in her report, in accordance with the submissions of prominent legal authorities, that banning such enforceability would likely contravene, at least in application to any specific case that may arise, the rights of Jews under the Charter of Rights and Freedoms and render such legislation unconstitutional. In addition, the bill would so severely impinge on the law of contract that it is singularly unique to any common law jurisdiction in the entire world for its invasion of such rights.

The report of the former Attorney General and adviser to your own Premier actually quotes legal authorities. It cites a case in the Supreme Court of Canada called Syndicat Northcrest v. Anselem, 2004 SCC 47, where the court explicitly recognized the religious beliefs of individual Canadians as overriding the attempts of groups to suppress them. In that case—and I apologize for getting technical here, but this is important—the Court upheld the religious rights of a private condominium owner under the charter who was illegally denied permission by his condominium corporation to erect a Jewish religious structure called a sukkah on his balcony.

You may ask, "What does that have to do with this case?" Well, that case had to do with the rights of an individual in a private corporation. Imagine how much more applicable the charter would be to a public statute invading the rights of an individual who wants to go to a faith-based court, when you've had these rights for 130 years in this province. It is self-evident that the charter would be even more applicable to a government statute than to an illegal private condominium bylaw when such a public government statute so blatantly discriminates against a group of citizens precisely because of their religion.

1010

There is another problem you have. We have something called article 27 in our Charter. This particular article expressly dictates that the charter will be interpreted—will be, not may be—"in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." This article distinguishes our Charter from the separation of church and state establishment clause found in the American Bill of Rights. Multiculturalism is not just going down to the Danforth and having souvlaki, dancing waltzes and enjoying ourselves at city hall on July 1. Multiculturalism is all about recognizing our differences, our rights. This is what it's all about. This is the true challenge we face. That's what article 27 is all about.

This is a significant section of our Charter, which imposes on the Ontario government that it have legal respect for the rights not only of Jews but of all Canadians for their respective traditions. I don't think, even without this particular article, that any United States or British government would even consider interfering in the rights of a citizen to contract for private arbitration of any kind so long as both parties freely consent to contract for it, unless there is existing historical evidence of harm to the public, of which Ms. Boyd found none.

Having said all that, we are suggesting to you that if you are going to pass this bill, which we've just told you has serious problems, what kind of bill are you passing? Do you realize there are no transitional rules in this bill? Has anyone looked at this bill carefully enough to realize that it impacts on the rights of Jews and others—not just Jews—in respect of arbitration rulings that have already taken place going back to 1897? We're talking about rulings that have not been incorporated into judgments. You have no transitional rules in this bill. Say a woman got a ruling for spousal support 10 years ago in a private arbitration ruling, and say that the arbitrator may possibly have mentioned in her ruling some case from Michigan or something—it doesn't have to be a Jewish case; it may not have anything to do with faith-based arbitration. Under your proposed legislation, that particular ruling is now void because you don't have any grandfathering provisions in this bill. Nobody has bothered to put them in. You haven't said that any legislation prior to the enactment of this bill is still okay. It's meaningless, because that particular decision of that arbitrator was not rendered in accordance with Ontario law. Any decision of any Jewish court going back to 1897 is void. Think what you're doing here.

This bill strikes at the very integrity of the historical right of contract, equal rights and an article of the Jewish faith to resolve disputes within their own courts if parties so desire and freely choose. If it is not amended or abandoned, the rabbinical council and these organizations are committed to defending the historic rights of the Jewish people in Ontario and the civil rights of all Ontarians to contract, no matter what their religion, since government has no business in the synagogues of the nation.

We also want to mention a question that comes to us all the time: If rabbinical courts already rule in accordance with the principles of Ontario law, what is the harm of Bill 27? The new law says that all arbitrations must be in accordance with Ontario law. So we're often asked, "If Jewish courts often rule within the principles of Ontario law or are similar to Ontario law, what's the difference anyway? Why don't Jewish courts simply agree with this law?" Let me answer that.

The rabbinical courts apply the principles behind the concept of equalization of family property, the child support guidelines, the best interest tests in custody/access cases and spousal support, and they apply them fairly, with all the trappings of due process. In fact, we'd like to say the Torah invented them. However, they use the process and principles of Jewish law and the tradition guaranteed by article 27 of our Charter in accordance with the principles of family law, but do they apply these principles exactly in the same way that the Superior Court judge does? No, of course not. That would be like saying that secular arbitrators act exactly the same way that judges do in all cases.

Rabbis are not lawyers, and their parishioners do not expect them to be. I think you are discriminating against Jews to say that they must act, and have their rabbis act, exactly in the same way that a person who goes through a secular arbitrator does. That's pure discrimination.

When it comes to the child support guidelines, they look at them very carefully. When it comes to a child's best interests, they often send a couple and their child for parenting assessments, the same way that the courts do. When it comes to property distribution, women are treated with the same community of property rules as the Ontario courts, but the method of calculation may not be exactly the same. However, financial disclosure is always required.

Lawyers are welcome when it is necessary, especially when the parties insist on their presence. Nonetheless, those Orthodox couples who want these rabbinical services not only hold them sacred, but they do not want the public glare and relative expense of the secular courts. For women, going to these courts is not just a matter of choice; it is a tenet of their faith no less important than any of the Ten Commandments, especially when they are dealt with fairly. For the Ontario government to ignore that sincerely held faith so frivolously is very curious indeed.

Secondly, family law arbitration is not denied by Bill 27 to secular couples when they seek to arbitrate family law matters privately. Non-Jewish private couples will also still be forced to arbitrate by Ontario law. So you may ask, why bother arbitrating at all under this bill, why not just let everybody go to the courts? Well, obviously, the answer is because people still want privacy. People will still want to arbitrate. So the answer to the question is that there is still a need for privacy.

Well, guess what? To Orthodox women especially, there's a concept of modesty. In our language, it's called "tzinyos"—modesty—and this demands privacy about such delicate family matters, especially when the topic involves matters of intimacy, particularly on occasion when these problems can lead to the resurrection of the marriage, what we call "shalom bayis," or peace in the marriage. Alternatively, it may demand a divorce on terms, but the requirement of privacy when dealing with domestic and possibly intimate matters is crucial to a Jewish woman's spiritual makeup, something secular people sometimes forget or cannot easily understand.

This bill takes that right of spiritual privacy completely away from her, because she would find it difficult or perhaps impossible to agree to a dispute resolution forum outside of her own faith. Now, with Bill 27, that forum's decisions will no longer be enforceable.

Why does the Ontario government wish to deny the right of privacy to Orthodox Jewish women who wish to retain their desire to resolve matters of acute domestic embarrassment and intimacy with their rabbis, a process and tradition stretching back thousands of years?

The arbitrators, the rabbis of Orthodox Jews, wish to employ these traditions to interpret the principles of Ontario family law, and have been doing so without any problems since the English Act of 1889. If your committee recommends passage of this bill, Ontario will become the only common-law jurisdiction on earth to interfere with the sacred right of contract.

1020

Lastly, before I turn the floor over to Rabbi Ochs, I just want to mention that it takes several years of post-graduate studies to become a rabbinical judge. These are highly educated gentlemen. The family law rabbinical courts I have attended over the past 25 years have 12 years of post-secondary school training in Talmudic law before being appointed. A number have university degrees, one of whom is a professor of philosophy at York University, Rabbi Immanuel Schochet; another is a law graduate, Rabbi Stern; another has a masters in psychology, Rabbi Taub, in addition to their vast Talmudic learning. Their whole purpose is to first attempt to achieve family peace, that is, marriage counselling, a sincere attempt by the rabbis to revive a marriage before they even begin arbitrating.

I need you to understand that to take away the power of the Jewish courts is to interfere with marriage counselling, because before they get to the arbitration step, the rabbis first attempt marriage counselling. Then they go to mediation. If that fails, then they take the step of arbitration. This is a process known as Jewish mediation-arbitration. Moses invented it thousands of years ago, well before it became popular as an alternative form of dispute resolution in this jurisdiction. The rabbis ensure that their arbitration agreement specifically excludes section 35 of the Arbitration Act to permit such mediation. Then, those issues that cannot be resolved through mediation are arbitrated in the rare case where the threat of arbitration does not work. This method is so successful that only a handful of cases are actually arbitrated in the Jewish courts. But if you take away the threat of arbitration in this process, the Jewish court and its powers

will be hindered. If rabbis are restricted to employing only Ontario law and not Jewish law and tradition in their deliberations, then their decisions can never be enforced because they are not Ontario lawyers, nor should they be expected to be Ontario lawyers.

The law can also mean process, the process of liberating Jewish women, among others in our community, to practise their faith to resolve their disputes as they see fit in the privacy of their synagogues. You interfere with a woman's right to privacy and you are on the road to tyranny.

Thank you. Those are all my submissions. I'd like to turn this over to Rabbi Ochs.

Rabbi Mordechai Ochs: I endorse the eloquent words of my good friend Mr. Syrtash. I appreciate this opportunity to address you.

First of all, I'd like to, in a way, present our credentials. Jews have always had a passion for justice, going back to the Biblical command, "Justice shall you pursue," which in our tradition we interpret as meaning that not just the goal and the end has to be just, but also the process has to be so.

There is an apocryphal story that is told about a person who once came to a judge and said to him, "You know, my grandfather knew your grandfather." The judge then turned to the other litigant and asked him, "Did your grandfather know my grandfather too?" And he said, "No." He said, "In that case, I disqualify myself from this case." The Talmudic story is somebody who lifted something that had fallen on the shoulder of the judge. He said, "I can't be your judge anymore. You've done me a favour."

Remarks in Hebrew.

"Zion has heard and rejoiced, and the daughters of Judah jubilate because of your system of justice."

Jewish women are not discriminated against. They enjoy the fact that they are treated as equals. That is the basic concern of all those who sit in judgment over them, who practise absolute justice.

If you find that there's a suspicion of a problem in the community, then the answer is not just sort of spontaneously to limit other rights. You can't address a problem by taking rights away from others, rights which have been enjoyed for over a century here and from time immemorial, and values that have been appreciated from way back when.

We're very concerned about the Charter of Rights. The government has taken steps to ensure that it is practised equally. But why be selective in the rights that you choose? It leads sometimes to conclusions, so that the legislation, in a way, goes far beyond the standards of modesty and public morality as accepted wide and large. If you are so concerned about pursuing that legislation, that the government has no right in the bedrooms of the nation, and beyond the bedrooms, in the boardrooms and who knows where else, why not also be concerned about the problem of freedom of religion? I must say, I'm very pained at the fact that very much what seems to be happening in our legislative system is that we are concerned with freedom from religion more than with freedom of religion.

Let's just have a moment about how Jewish courts operate. A couple decides by free will to come and to be arbitrated. Our first approach is to attempt to establish harmony. Is there a possibility of reconciliation? If that fails, then we want to make sure that there's an equitable distribution of assets between them, that what is both possible on the one hand and what is feasible and proper should be performed.

I have a letter here which was sent to me. I'm just going to read you sections of it. I wouldn't bring it up, I'm embarrassed to read it, but I think it shows a case in point of how couples respond:

"Dear Rabbi Ochs,

"Thank you for arranging my get in such a thoughtful, caring way. You have renewed my interest in my faith and myself, and I have great words to share about you," and she goes on with a few more statements.

"I let you know that my ex, too, thought how alive and fluid is the Jewish religion and, in his words, you're a dear man. I'm shedding tears as I write, hoping that I can plan a life in which others think so well of me."

I don't know how many judges receive letters of this nature, but often it's a learning experience, and the parties grow. They have the right to be judged by people with whom they are in contact, to whom they look for spiritual guidance in their personal and business lives and in their interpersonal relationships.

If you find that there is a problem in the Jewish community, I'm sure that the present court system can deal with that without new legislation. If someone is afraid to approach the courts because of community pressure, the law does not solve that problem. I think that if one goes ahead with the legislation as presently worded—you've heard the expression where after an operation, they say, "The operation was successful. The patient is dead." I think what we will have here is that the issue is addressed, but democracy is dead.

The Chair: You have five minutes left, just so you know what time is left.

Mr. Syrtash: We're here for your questions, basically. We've said a great deal. We feel this is a terribly tragic mistake that's about to be made, unique in the world. We have a whole body of law that's gone on for literally thousands of years—in this jurisdiction, for 130 years—with no evidence provided by anyone that in this jurisdiction there has ever been a problem. We're asking you to ask us questions about our process. Ask us what problems, if any, we've ever created for the province. Ask us, because this legislation is supposedly designed to answer a problem that we say doesn't exist. We have a whole report from Marion Boyd that says that.

So we're here. Ask us whatever questions you have.

The Chair: You've given about a minute and a half for each party, beginning with Mr. Runciman.

Mr. Robert W. Runciman (Leeds–Grenville): Thank you for being here. You made some very interesting comments and perspectives that we haven't heard up to

this point. I guess what you're talking about is what you describe as a fine tradition which has worked well for 130 years, and essentially, "Why throw the baby out with the bathwater?" is one way of putting it.

1030

You believe there's a strong case to be made that this violates the charter. I'd like to hear, from your perspective, if you allowed the process to continue as it has for so many years, and you have other groups—in this case, we know that there are proponents of sharia, for example—who wish to exercise essentially the same rights that you've been exercising, how would you see that from your perspective?

Mr. Syrtash: I can't comment on other legal systems; we're here for the Jewish court. But I can say as a lawyer who has practised and who has done perhaps the most research of anyone in the province—I wrote a book called Religion and Culture in Canadian Family Law, published by Butterworth, and I assisted Ms. Boyd in her report—when I give you my own exhaustive research on this, I honestly believe, and I say this with the greatest of conviction and sincerity, that I have tremendous love and a great deal of affection for the Ontario Family Court. I think they're extremely well equipped. I've travelled around the world in the legal system, I've gone to a great number of conferences, and I can't tell you how much respect the Ontario Family Court has in the world and what great integrity it has.

There was only one time, and this was mentioned in her report, so I'm not just pulling this out of my hat, that the Ontario court was confronted with a situation where it had to deal with a sharia-like—that's a bad word—a situation where a religious court had to be confronted. It happened to be a Jewish court—it was an isolated situation—which had lost control of its process, in a case called T. v. T.; I won't give the names of the individuals. The issue had to deal with child support and access. The court had gone on way too long in its process, so a certain judge, Madam Justice Speigel in that particular case, had decided to take the matter out of the hands of that court because it had gone on too long. It had its jurisdiction. It had what's called parens patriae jurisdiction, and that means that the court has jurisdiction over its own process in any case. That's already the law of Ontario. So it took the matter out of the hands of that particular court. Her Honour made a decision on access and made a decision on child support, and said, "We're taking the matter out of the hands of this particular court," and dealt with the matter.

What we're saying is, if ever a problem does arise, and it may well arise, whether it's our court—I doubt it, but it might happen again in the future—or a Buddhist court or a Muslim court or any court, this court is perfectly equipped to deal with it.

The Chair: Thank you. Mr. Kormos.

Mr. Peter Kormos (Niagara Centre): Thank you very much for your participation and valuable contribution.

First, Mr. Syrtash, your article in the Lawyers Weekly speaks as well of the prospect of this legislation making de facto arbitration awards void by virtue of them not having the certificate of independent legal advice attached. We'll be raising that tomorrow, Mr. Zimmer, in clause-by-clause, and we'll be questioning you about the impact as indicated by Mr. Syrtash.

I'm also concerned about the fact that in the legislation, one of the attractive qualities of arbitration—and you spoke to this—is that it's private. You can deal with things that you either don't want to deal with publicly or that you are emotionally, philosophically, spiritually incapable of dealing with publicly. Yet it seems to me that the enforcement process proposed—that alone in this legislation disrupts, as compared to using section 50 of the Arbitration Act. The enforcement process, which means suing for enforcement of the agreement, again undermines any privacy qualities to the arbitration, even under Bill 27. Is that a fair observation?

Mr. Syrtash: If I can make this comment: It's the very threat of enforcement that is useful for the religious courts, because it is not that you actually have to enforce, it's the fact that the power is there. It's very rare, I should tell you, that the Jewish religious court actually has a ruling that has to go to the next step where somebody says, "Here's the ruling of the Jewish court," and the woman has to go and take a child support order and have it enforced through a spousal support order. But the fact that the power is inherent means that a woman can go to a Jewish court and know that, if necessary, something can be done with that order. It's not that it's going to happen, but the fact that there's an inherent power there means that a couple has the confidence to know that something could happen.

Mr. Kormos: I asked Mr. Bastedo yesterday, and you confirmed what he said. My initial perception was that in a faith-based process, it would be the commitment that a party or parties have to that process—

The Chair: Can you make your question a little shorter?

Mr. Kormos: Yes, ma'am, thank you—that would be the most significant factor. In other words, it would be your adjudicative role that is more important than the enforceability. You're suggesting that that is not the case.

Mr. Syrtash: It's both. The fact is that without the threat of the enforcement behind the adjudicative process, it's going to be difficult for parties to even want to go.

Mr. David Zimmer (Willowdale): Both in your submissions this morning and in the article in Lawyers Weekly on December 9, which I read before the holiday season, the point is made about no transitional rules and no grandparenting provisions. While I appreciate that you have great difficulty with the entire piece of legislation, if I can just focus on these transitional grandparenting provisions. How would you see that operating—the transitional rules, the grandparenting rules—to alleviate some of the problems that you refer to, recognizing that you've got problems with the whole thing?

Mr. Syrtash: I understand. If you had grandfathering rules that said that up until royal assent at least, any decisions, whether faith-based or other, of any arbitrator could be enforced—so long as, of course, they were legally enforceable by operation of law up until that point—then it would be at least fair. But it is blindingly unfair now when people spend a great deal of money. I do a great deal of private arbitration, and even in Jewish courts, people spend sometimes thousands of dollars and invest a great deal of emotional time in private arbitration to come to some sophisticated orders.

The Chair: Thank you very much for your delegation today. We appreciate the time you spent here with us.

B'NAI BRITH CANADA

The Chair: Our next delegation is B'nai Brith Canada. Welcome. Thank you for being here today. If you could introduce yourself and the organization you speak for. When you do begin, you'll have 30 minutes. Should you leave time at the end, there will be an opportunity for us to ask questions.

Ms. Anita Bromberg: Thank you. I am with B'nai Brith Canada and I'm representing both B'nai Brith Canada and its agency, the League for Human Rights. First of all, I'd like to thank the committee for the opportunity to express what you will hear, which is our concerns about the proposed legislation.

I am Anita Bromberg, in-house legal counsel for the organization. If I may take a moment to introduce ourselves a bit, although hopefully most of you are familiar with our work, B'nai Brith Canada has been active across Canada, representing the Jewish community since 1875. Through its agency, the League for Human Rights, it has been well recognized as the foremost, if you will, Jewish human rights advocacy group in Canada. Our objectives include the protection of human rights for all Canadians, the development of positive intercommunity relations and the elimination of discrimination and anti-Semitism. We are dedicated to strengthening Canada's multicultural fabric, something that we in fact believe, as you will hear in my remarks, this proposed legislation fails to do.

1040

You'll be happy to know that as I was listening to the last presentation, a number of my comments have been said, and I'll try therefore to be brief and not redundant. But I must echo the words of the Va'ad and the respect that we have for the rabbis who operate the Va'ad. I sit before you not only as legal counsel for the organization, but I myself am an Orthodox woman practising and observing Jewish laws, and I can certainly echo the respect that women in the Orthodox community and the broader Jewish community have for the organization.

Before I turn to the more substantive concerns, I would like to take a moment to express our concern with the process as it has unfolded to date. The announcement, as made by the Premier, effectively ended a debate on a topic that in our surmise had just begun. The concerns of the vulnerable voices actually went unheard without input from all concerned on the path chosen here and as reflected in the legislation. In fact, the input that we took great pain and time to give through the Boyd hearings was largely ignored, in our estimation, in the bill before you today. That, I suggest to you, does not speak well for the democratic process.

As to the proposed legislation, my intention today is really to restrict my remarks to the Jewish community model, which, as you've heard, has worked well for over 100 years in Ontario. This is the area within the organization's expertise and knowledge. In effect, the proposed amendments take away an accommodation—a right, if you will—extended to the Jewish community for over 100 years in Ontario. The right to have an Ontario judge enforce rulings from an arbitrator based on a private contract to arbitrate has been exercised by Ontarians without legal challenges for generations. The 1991 legislation simply codified certain procedures for enhanced fairness.

The Premier, when he made his announcement, said there shall be one law for all Ontarians. While that might be laudable in its simplicity, in fact, it's simply not the case. As you've probably heard from other presentations, arbitration often looks to other legislation, to other jurisdictions for guidance, and that's allowed. Why should it be any different in the religious format?

The connection with enforcement, as you heard again this morning, is very key. Looking to our legal system, it's certainly not foreign to understand that a tribunal may exercise its limited jurisdiction but know that it has the enforcement of a court behind it and how important that is. I'm often presenting at the human rights level, and while it's rare to actually go to the courts to enforce it, having that threat is certainly an important part of the enforcement process.

Simply put for our purposes today, our concern is that the bill takes away rights, an accommodation that has operated successfully within the Jewish community for over 100 years. The Jewish community, which has been, if we look at history, the most dominant in the use of this accommodation has therefore been the most unfairly burdened by the proposed changes and, if you will, discriminated against.

It's our view that the bill is actually contrary to article 27 of the Canadian Charter, something you've heard mentioned today, so I won't go over the wording of it once again. But it is our position, as we put before Marion Boyd at the time of her review, that under the Canadian Constitution, Jews—and indeed all faith-based or religious groups—are guaranteed the right to contractually arbitrate arbitration tribunals within family law and other matters so long as—and this is important—the participants do so voluntarily and with due process and fairness.

I will suggest in a moment that in fact such safeguards are already built into the system to ensure the voluntariness, the due process and the fairness. But for the moment the bill is, in our view, contrary not only to article 27 but in fact to directions that have been given by

our Supreme Court of Canada. Again, you've heard reference to that.

The material might have a typo. It's actually "Syndicat Northcrest v. Amselem," for your reference. In this case, the court clearly recognized that Canadians have the right to exercise their own sincerely held religious beliefs. This is a case that we at the B'nai Brith are quite familiar with because our own experts were interveners at the Supreme Court of Canada and successfully argued this point. As you've heard today, and I just want to re-emphasize, it does have ramifications. The Supreme Court of this country has recognized that there is a legitimate realm for sincerely held religious beliefs. I just want to quote from that case for a moment, if I may.

"What then is the definition"—say the justices in the majority decision—"and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) Charter? This court has long articulated an expansive"—and I emphasize the word "expansive"—"definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom." It then goes on to quote Judge Dickson in the case called "Big M." Judge Dickson first defines what is meant by freedom of religion under section 2(a) of the charter, so it stands as an important decision. The judges in the Supreme Court then take this section: "A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."

The Supreme Court in the Northcrest case then concludes: "It consequently suffices that a claimant show that the impugned contractual or legislative provision (or conduct) interferes with his or her ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial."

It is therefore our view, keeping in line with what the Supreme Court of Canada has given us some guidance in, that every Canadian, every Ontarian, has the right to choose, of course, after the safeguards are considered, after ensuring that the participant has full understanding of the process. It's very important that that right to choose is not taken away and, in our estimation, unfortunately, that's just what the proposed legislation does.

I want to turn my remarks for a moment to some of the safeguards that have actually been removed by the proposed legislation. Let me explain that. The proposed amendments, in our view, actually take away safeguards that have been carefully built into the system, a system that has, as previously noted, worked well for the Jewish community over the last century and more. Indeed the courts were there, under the existing legislation, as a backdrop to ensure the fairness of the system. Under the bill, religious arbitration that falls under the very limited definition can in fact continue. But unfortunately, it will continue without the inherent safeguards already built into the system. In particular, I am emphasizing that the overview of the courts is taken away, which is no small measure.

Principles of fairness, equality and due process all are integral in the existing Arbitration Act. Indeed, the court has been given the power to set aside any award where a litigant has been treated unfairly or unequally; for example section 46. That's just one example of the safeguards that have been built into the act as it exists.

The experience of the Jewish religious courts has been that the courts will exercise as parens patriae supervisory, if you will, jurisdiction to override any unprincipled positions an arbitration panel might take. You heard from John Syrtash one example where such an exercise took place.

We recommended additional safeguards before the review held by Marion Boyd to further enhance the protection of the vulnerable. We've heard so many of the voices calling for that, so we crafted a number of protections that were designed, in our estimation, to further enhance what's already codified toward voluntariness and fairness. Unfortunately, as we look at the amendments, that's been largely left out.

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Some of our amendments were not accepted and noted by Marion Boyd, and unfortunately these would still have a dramatic effect on the vulnerable in the communities that have spoken to you. For instance, if I can take one moment to mention that we strongly proposed that there be a well-designed system of independent legal advice—and yes, I note that that has been referred to in the amendments, but what has been left out is who's going to pay for that. Women from marginal communities and immigrant communities may not have the funds to seek that advice, so they may find their decision challenged because they did not seek that legal advice. It was our suggestion that if the government is really set, as they should be, on protecting the vulnerable, principles of legal aid should be considered and access to legal aid ensured to enhance the system. But that hasn't been dealt with, and in fact Marion Boyd indicated that that simply would not happen. That's unfortunate, if the aim is to protect the vulnerable.

The way the consultative process unfolded and then was abruptly halted has in fact, in our estimation, left the vulnerable simply unprotected, and many of the realities of the situation unexamined. We have heard in some of the submissions, particularly yesterday, that there is a controversy among a number of groups saying that they felt their concerns were not taken up by Marion Boyd, that there had been abuses, that there was a potential for abuses and Marion Boyd had simply "erroneously," as one presenter actually said, dismissed it. I certainly have looked at and heard a number of the presentations, and I would suggest that Marion Boyd in fact found that there were no abuses within Ontario. Partly, that's because, as we've maintained, the act and its present system have safeguards that were there, are there and should continue, but unfortunately the amendments don't take that into account and in fact cut off, as I've tried to point out, one of the most important points, and that's the overview by the courts. In essence, what you've done, what the bill

will do—and it has been echoed by other presenters—is push an underground economy even further. That has to be of great concern. So in the end, if the underground system develops and continues without the overview of courts, the enforcement of courts, then you've worsened the situation by not protecting the vulnerable, which is everybody's shared concern.

I just want to turn for a moment to a couple of the specific provisions in the legislation. It is our view that section 2.2, which contains the definition of what would be religious arbitration from that day passing forward, is unworkable. One of the words that I think shows where the confusion could come in: For instance, the section refers to the word "conducted." Does "conducted" mean a reference to substantive issues or, as is more commonly used in legal parlance, a reference to procedure? If they follow procedure of Ontario law henceforth, versus substantive issues, will that be a way to get around the definition? Is it going to be enough if, in a decision, an arbitrator dots his i's, crosses his t's, complies with Ontario law and then in the end says—and I'm being somewhat sarcastic; I'm trying to think of an example—"Thank God, we've reached an end"? So he's called on the blessing of God at the end of his decision, after being very careful. Does that mean that his arbitration has not been conducted exclusively within Ontario law because he's called on a religious principle, as minute as it is? These are the kinds of questions that we may never know until some challenges make their way to courts, and obviously it's something that we should be mandated to avoid.

You've heard some suggestions about the reworking of section 2.2, and I certainly leave it to this committee to consider if there is a way to rework it in such a way that allows for a more comprehensive system. We stand before you today quite concerned about the legislation and suggest that it's simply unworkable.

If, in fact, it goes through, another suggestion was made to you that regulations will have quite an important and profound impact on the workings of the legislation. We too ask that any enactment of legislation be made subject to consultation with community stakeholders. Some of the regulations will have profound effects, as you heard just now. For instance, they may have unforeseen retrospective grandfathering effects that will wipe out an arbitration that may have taken place 10 years ago but that a woman is just moving now to enforce. I would ask you to consider that.

I just want to bring my remarks to a conclusion so you do have a few minutes to ask me whatever questions you might have. On behalf of B'nai Brith, I would like once again to thank the committee for their time and would encourage its members to reject the proposed amendments pending further and thorough examination of the many issues that have been raised today.

The Chair: You've left about four minutes for each party to ask questions, beginning with Mr. Kormos.

Mr. Kormos: Thank you kindly. First, I feel compelled to respond to your comments about Ms. Boyd's report. What she in fact said was that the review did not find any evidence to suggest that women are being systematically discriminated against as a result of arbitration of family law issues. Clearly she was talking about the full range of arbitration; she made that statement. She was talking about systemic discrimination, and she was also talking about evidence. We all agree that because of the nature of arbitration and the lack of public supervision of it—I'm not suggesting that's right or wrong; I'm just making that observation—of course there's no evidence. There's anecdotal evidence, but there's no hard data.

Again I want to reiterate, as I did yesterday, that in my view Ms. Boyd conducted her role in an exemplary way. I don't agree with the recommendations she made, and my party doesn't agree with the recommendations she made, but that doesn't detract from the fact that she presented a valid option; it's as simple as that. I want to commend Ms. Boyd for the work that she did.

Be very careful, Mr. Rinaldi. To simply dismiss the opposing view is a very dangerous thing, especially in the course of what we're doing here. Ms. Boyd presented an option that has arguments to support it. New Democrats don't agree with it.

I want to talk to you, though, about the role of arbitration. Intellectually, I'm a fan of arbitration. But what we're concerned about here is—let's be candid—women who are coerced into so-called arbitration processes. Let's face it: The premise of arbitration is that you have two or more parties of free will, with reasonable balance in terms of power, who voluntarily enter into it. As soon as you've got a scenario where a person is being coerced into it, either through outright force or through cultural force, it's not really an arbitration anymore because it lacks that fundamental premise.

You understand what we're concerned about: How does one address those legitimate concerns? I'm convinced the act won't address it. It's just that the same cultural forces that compel women to participate in an unfair "arbitration" process are going to be the same cultural forces that compel them to comply with the ruling—they won't need courts. How do we deal with that? It has to be responded to. We can't put our heads in the sand.

Ms. Bromberg: I appreciate that, and it echoes my concerns. While I'm here to speak from a Jewish community's point of view—there have been no presentations to you directly on problems within the system; the voices have come from other community groups—I will say, as I tried to say in my remarks, that the act simply doesn't address it. If that's the concern that it attempted to address, the proposed legislation simply misses the mark. You've left women as vulnerable as they were and, perhaps, as I've suggested, even more so, by taking away a couple of the very effective safeguards that have been built into the system. That's my disappointment with the process.

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Mr. Zimmer: I have two questions: one about legal aid and one about transition or grandparent provisions. While I appreciate that you have difficulties with the whole scheme, with respect to transition and grandparent provisions, how would you like to see those evolve, if that were the case?

Ms. Bromberg: From a legal perspective, we certainly have a lot of experience on how to work to avoid a retro effect so a specific provision could be put in that it only applies to arbitration from this point forward. I think that a lot of concerns will arise when regulations are being passed, so having full consultation and examining carefully the ramifications of qualifications, training, record-keeping, attachment of independent legal certificates and all those issues will have to be carefully examined at the regulation stage. I can't imagine that our legislative wizards in the drafting department will have any difficulty finding a precedence that will avoid those effects. We've been building that into legislation from the beginning of our country, and effectively, too.

Mr. Zimmer: I was taken by your remarks on the legal aid issue. What is your experience with women of faith who want to access the arbitration system of their faith, in the Jewish system, if they are not of independent means or find themselves needing legal aid? How do you deal with people who don't have the financial resources to access the system now? How is that dealt with now?

Ms. Bromberg: They turn to their family and friends and beg for the money to help their families out. I volunteer, for instance, at a women's shelter that often has Jewish women who are escaping abusive situations. The community rallies around and assists them in whatever way we can.

In terms of the proposed legislation itself, I think we have to be cognizant. If the government is saying that they're passing this legislation with a view to protecting vulnerable women, the realities of these situations have to be examined. The realities are that it's largely vulnerable women who are going to find themselves without means and you're going to tell them, "By the way, if you do choose to go the arbitration route because of your faith-based beliefs," let's say for the purposes of this argument, "you're also going to have to get independent legal advice, which is going to cost you." The person will go to legal aid and be told, "Sorry, we can't help you." What will the woman do when she has a choice between putting bread on the table for her child or getting legal advice and worrying down the road whether or not the decision will be upheld? Obviously, the choice is simple for a mother. Therefore, she may not get the kind of advice that she needs to protect herself.

In the end, what has the government done to really protect the vulnerable? It's giving lip service, when the realities might suggest something quite different. That's our concern.

Mr. Runciman: Thank you for being here. I want to indicate our strong support for the position you've taken with respect to consultation and the regulations. I think your comments related to the failure to consult earlier were well taken. Once Mr. McGuinty went back and forth on this and ultimately made a weekend decision—at that point, given the fact that you and others who've appeared before us have entered into that process in good faith, if you will, and then to have the door slammed in your face and then not provide you with that opportunity prior to the tabling of legislation in the House, I think, was truly unfortunate.

There's some indication here this morning with respect to the potential legislation violating the charter, being unconstitutional. Apparently, Ms. Boyd, in her report, made some reference to that as well. The reality is I think it's fair to say that, in some way, shape or form, this legislation is going to pass. I'm wondering if there has been any consideration on your part and on the part of your organization to pursue that legal course, if you will, at some point in the future.

Ms. Bromberg: At this point, no. We believe in the democratic process, and we're here to present our views and hope that they'll be listened to. But here's our concern: When you combine the bill with the procedure that was followed with the concerns that have been raised by the organized and not-so-organized religious Jewish community, we stand very concerned that the multicultural fabric of Ontario is weakened and not enhanced, that the direction of the Superior Court of Canada has not been followed here. The legislation simply attempts to say that religious arbitration will continue, but without the safeguards and the mechanism, the message is quite different.

Mr. Runciman: Can I get a quick comment on a number of other things? I know you referenced legal aid, which has been suggested by a number of other presenters. One of the elements was who was involved with respect to the ability to waive the right of appeal. There's some concern about that in the legislation, but some of the proponents of change have also said that if you restore the ability to waive the right of appeal, that should only be confined to arbitrators who are lawyers or judges. Do you have a view on that?

Ms. Bromberg: We maintain that to have true religious arbitration, there has to be a role for religious authorities to make the ruling. The problem that we have with the definition is when it wipes out the role of those religious leaders and imposes a legal standard that belies the very purpose of religious arbitration.

Mr. Runciman: Essentially, you have difficulty with that kind of a restriction. Are you supportive of continuing to have the enforcement provisions, as they currently stand through section 50, available through arbitration?

Ms. Bromberg: Yes, it being key, in our opinion.

Mr. Runciman: "Being key." I think most of the contributors would share that perspective. Thanks very much.

Ms. Bromberg: Thank you.

The Chair: Thank you very much for being here today. We appreciate your delegation.

CANADIAN ISLAMIC CONGRESS

The Chair: Our next group and our last speakers are the Canadian Islamic Congress. Good morning and welcome. Are you both going to be speaking this morning?

Dr. Mohamed Elmasry: Yes.

The Chair: Okay, great. If you could identify yourselves and the group that you speak for. After you've done that, you'll have 30 minutes. Should you leave time at the end, we'd be happy to ask questions or make comments on your delegation.

Dr. Elmasry: Thank you. My name is Dr. Mohamed Elmasry. I'm the national president of the Canadian Islamic Congress. To my right is Ms. Uzma Ashraf. She is a member of the legal team of CIC, which is working on this bill.

I'm a professor of computer engineering and a father of four children, all professionals. The oldest is a crown prosecutor working for this government, which is trying to pass this bill. I've also been an elder, if you like, in my community. This means that I did mediation and arbitration for family matters, so I do come from certain experience.

I want to make general remarks, and Ms. Ashraf will actually read a position paper. Then I might add more before the questions and answers.

The first point I would like to make is that I did hear the two Jewish groups before me make an excellent presentation and, in the context of Jewish faith practice, I will submit to you that if you replace the wishes of Orthodox Jewish women with the wishes of Orthodox Muslim women, you would get a clear idea. Also, if you replace Halacha, which is Jewish law, with sharia, which is Islamic law, again, you'd get a fair idea about the terminology that we are talking about.

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The second point I want to submit to you is that there is already a partnership between the government of this province and faith-based communities in the case of marriage. This means that, for example, a Muslim couple will go to a licensed imam who can perform marriage, and that couple doesn't have to go to city hall to register that marriage. The marriage officiator is actually recognized by the province, and that person must perform the marriage according to the law of the province. There are certain credentials that that person has to have. This means that there is already a very successful partnership between the government and faith-based communities.

The third one is a general observation that the bill is a bad bill—you already heard that in many terms—and it was wrongly motivated by this government. You probably know the history: Many faith groups had the right of mediation and arbitration to be recognized by the courts, and then, when the Muslims came and said, "We ask for this also," they said, "No way. You guys can't have it. We're going to take it from everybody else." I think this really borders on a racist attitude from this government, and we reject it totally.

Equal rights is very important. In our position, you will see many advantages of regulating and recognizing mediation and arbitration, faith-based or otherwise. I want to emphasize that faith-based is one dimension of mediation and arbitration. It could also be civil-based, with nothing to do with any religion.

Ms. Uzma Ashraf: I want to just start off with the Canadian Islamic Congress's position. We support the implementation of faith-based and other civil mediation and arbitration as a legally recognized option for resolving personal and family law disputes. This alternative option for conflict resolution should fit within the framework of established Canadian principles of equality, fairness and justice.

As a little bit of an introduction or background, I'd like to say that in reality, Canadian society does not divide religion and the law; in fact, it does overlap. Laws regulate all aspects of life such that it is virtually impossible for legal doctrine not to overshadow religious practices and beliefs. The concepts of marriage and family are at the core of all religions. In our pluralistic society, it is only reasonable to expect faith-based panels to be involved in family and personal law matters and to work together with the judicial system in providing dispute resolution.

With the implementation of regulated, legally recognized mediation and arbitration processes, society will reap social benefits that cannot be experienced through secular courts alone. Moreover, fear of abuse and coercion within mediation and arbitration processes can be obliterated through elements of transparency and accountability that are inherent through the proper regulation of such processes.

Now for our recommendations and reasons. Firstly, third parties, which include faith-based and other civil resolution processes, should have legal recognition with respect to family and personal law disputes because they are more cost-effective and efficient and they introduce a hearing factor into many resolutions. Court proceedings can be lengthy and extremely costly for the parties involved. In contrast, along with being more timely and financially feasible, legally recognized mediation and arbitration processes offer a suitable alternative by alleviating serious case backlogs in the courts and by offloading severely taxed court resources. In addition, faith-based mediation and arbitration processes have a spiritual component inherent in family dispute resolution which essentially restores peace of mind to all parties who once shared harmony within the relationship. Unfortunately, the Canadian legal system provides little or no emotional or spiritual healing.

The second point: Legislation should validate family and personal law decisions made by faith-based and other civil arbitral tribunals. By implementing the recommendations of Marion Boyd, sufficient checks and balances are in place to ensure that a miscarriage of justice does not occur. Some of these examples—but there are certainly many more in her report—include the ability to set aside an arbitration agreement on the same grounds as

any domestic contract; signing a certificate of independent legal advice or an explicit waiver; having arbitrators develop a statement of principles of arbitration that explains the rights and obligations of the parties, as well as the religious processes that are available for achieving this resolution; and requiring specialized training and education for professionals engaging in arbitration.

The third point: Legally recognized and regulated mediation and arbitration processes are more effective and equitable than traditional legal proceedings because the implementation of mechanisms, as outlined in Marion Boyd's report, will ensure that the resolutions are less vulnerable to abuse. Specifically, mediators and arbitrators will be required to screen the parties in order to identify power imbalances and domestic violence by using a standardized screening process developed by the provincial government along with professional bodies. Therefore, recognized and regulated mediation and arbitration processes provide a proactive approach to minimizing injustice, whereas the courts simply provide a reactionary approach.

Fourthly, recognized and regulated mediation and arbitration processes are more effective and equitable than unrecognized and unregulated practices. The imposition of regulations formalizes an informal and non-standardized manner of decision-making that is already in practice, thereby ensuring that any resolutions of legal issues occur in accordance with the principles of justice.

In reality, very few arbitrated settlements end up before the courts because often parties feel empowered by resolving family and personal issues without judicial overshadowing. As a result, regulating faith-based and other civil mediation-arbitration processes provides legal protection for all parties involved.

Number five, as Canada is a self-defined multicultural society which consists of multi-faiths, it must respect the belief systems of all cultures and religions. Legalizing faith-based mediation-arbitration enables practitioners of all faiths to implement their values in dispute resolution while remaining within the boundaries of justice. Moreover, the right to use arbitration based on religious principles is protected under section 2(a) of the charter, which guarantees freedom of religion. Legally recognizing voluntary faith-based mediation and arbitration in actuality provides greater equality among Canadians of all faiths.

Briefly, my conclusions: In practice, religious and legal spheres do overlap. Specifically, the concepts of marriage and family are firmly rooted in religious doctrine, while the resolution of marriage and family disputes rests at the heart of family law. To affirm this fact can harmonize the interrelationship between Ontario laws and religious beliefs and customs. Faith-based mediation and arbitration has been successful in the past, such that individuals who have volunteered to resolve their issues in this manner have achieved pleasing results that have fallen within the boundaries of fairness and justice.

This is an important point that has already been mentioned by Professor Elmasry: Legally recognizing faith-based mediation and arbitration is not the originating stepping stone for allowing the infiltration of religion into the legal system. As a matter of fact, for years, faith-based communities have been given the right to perform provincially recognized marriages. Licensed professionals from religious communities are given full authority to officiate marriages according to the laws of the land such that couples who participate in these faith-based marriage contracts are not required to re-register their marriages with civil authorities. Hence, it appears only natural that the legal introduction of faith-based mediation and arbitration would appear to be the next logical step after the infusion of religion into the legal marriage process.

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In conclusion, I'd like to state that the CIC recommends that Bill 27 be rewritten to take into account the above recommendations for the common good of the people of Ontario. Faith-based mediation and arbitration can provide resolution for family and personal law disputes that are expedited, cost-efficient and injected with a dose of spiritual healing. With the appropriate precautionary mechanisms in place, religious minorities can achieve legally binding resolutions that are reached through the incorporation of their own religious beliefs while respecting principles of justice, fairness and equality.

Dr. Elmasry: I want to make some concluding remarks in the form of a question to Ms. Ashraf: I just want to ask you, as a Canadian-born Muslim woman and professional, would you actually go to your local imam in the matter of a family dispute?

Ms. Ashraf: Absolutely. Before even turning to the courts, that would be the first step that I would take, without a doubt.

Dr. Elmasry: What about the concern that some Muslim women would somehow be forced into mediation and arbitration against their will?

Ms. Ashraf: This is a voluntary process. As Marion Boyd pointed out in her report, there should be a standardized manner to determine whether there are power imbalances and domestic violence already occurring within the relationship.

Dr. Elmasry: But a Muslim couple can also be forced into the legal system and have a bad lawyer.

Ms. Ashraf: Absolutely. In the traditional court system, who's to say that a woman will not be pressured to resolve the matter and make a settlement that is not equitable or appropriate for her conditions?

Dr. Elmasry: Thank you.

The Chair: You've left about four minutes for each party to ask questions, beginning with Ms. Matthews.

Ms. Deborah Matthews (London North Centre): Thank you very much. I'm wondering if I can ask you to take a gender-based perspective—I think that's a bit where we were going—and just ask you if you think there is a gender consideration in this legislation.

Ms. Ashraf: Is there a gender consideration?

Ms. Matthews: Is the concern a gender-based one? I'm asking you to take a gender-based perspective on this legislation and the whole issue that led to it.

Ms. Ashraf: Okay. The way I see it is—actually, would you like to—

Dr. Elmasry: Yes.

Ms. Ashraf: I know he can't give a gender—

Interjection: Sure he can.

Ms. Ashraf: Well, I'll add some comments.

Mr. Zimmer: He has a gender.

Ms. Ashraf: But I mean it's obviously not mine.

Dr. Elmasry: I have two daughters and a wife.

Let me just give you some background. I've seen cases of divorce in this province which take years to finish. The winner is not really gender-based; the winner is the lucky person who can get a powerful and experienced lawyer. The settlement at the end could be in favour of the man or the woman; it depends on the lawyer they hire. This is a fact of life.

We're saying here that we have an opportunity to have a partnership between the government and the faith community, like in the case of marriage, where you'll actually have checks and balances. You've heard of the underground economy, and the model actually is there, except that the government has no say in what's actually happening in the back doors or the alleys with this mediation and arbitration. So this means that we can fix the system, but throwing out the whole system just because we cannot fix it—I'm submitting to you that you can make checks and balances; you can license these people. Make sure the tribunal for mediation and arbitration has a woman member; it must have a woman, so that you have the right background. It could be five, okay? When the parties come to mediation and arbitration, the mediator will be forced to take minutes of the meeting, to have witnesses and to ask the two partners, "Did you go to an independent legal adviser?" If not, they have to send these partners, or the man and wife, to get independent legal advice, putting in as perfect and robust checks and balances as possible.

I'm not an MPP and I'm not a lawyer, but I can tell you that in any system, be it electronics or computers or politics, you can have the checks and balances if you want to; it's the political will. Unfortunately, the government of this province doesn't have the political will and the guts to say that the Muslims of this country are equal to anybody else and they should have the same rights. It was a political decision, as you heard already, on a Sunday afternoon. The Premier of this province was under political pressure from the right and left and up and down, from women's groups and other groups, and he said, "No, we're going to throw everybody out of the system." That's stupid politics. This is a very opportunist way of doing politics in this province. I'm submitting, especially to the members of Parliament who are Liberal in this committee, to say no to this bill. Don't let only the opposition say no; you also say no. It's a bad bill. It doesn't solve anything. It only satisfies the ambition of the Premier of this province. Did I make myself clear?

Ms. Matthews: You certainly did.

The Chair: You have about a minute and a half if you do want to add anything to that.

Ms. Ashraf: Yes. I was just going to reiterate what Professor Elmasry said. A panel should not just be based on the arbitral decision of one individual. There should be many people on that panel; for instance, social workers, who would obviously be aware of social issues, domestic violence and abuse toward women. There could be a female arbitrator. There should be religious and community leaders involved. Again, there should be a choice between both parties to determine who should be on that panel so it's not something that will be enforced by one party upon another. Also, what I'd mentioned in my report with respect to Marion Boyd's recommendations, a standardized screening process would determine beforehand whether there is even a power imbalance. For me, again, as a female, I would feel very comfortable in this approach. In fact, I would feel that I have more autonomy and that I'm in more of a position to put my thoughts forward and get some sort of resolution that will be appropriate not only for me, but also for my partner.

I'd like to say, what checks and balances are in place within the court system? If we leave it all to the courts and leave it to plainly the letter of the law, there are no checks and balances there. I see it all the time in court. People submit to resolutions that are not appropriate for them, and then that's the end of the story. Sure you can appeal it, but there should be another option available for people. I think by putting the proper regulations and mechanisms in place, you can get a resolution that will not be based on any kind of adversarial precursor, and people will be happy. In fact, there will be other people looking out for the interests of each party. It's not necessarily the woman who is always the victim.

The Chair: Thank you.

Mr. Runciman: Both Mr. Yakabuski and I have some questions.

I'm just curious about what has happened in the past with respect to your religion and family-based disputes. There has been a process in place which hasn't been structured through legislation, but it has been a process that, I assume, from your perspective, has worked well. This legislation won't change that, will it? That process will continue to function.

Ms. Ashraf: Certainly. My understanding is, yes, any civil process, regardless of whether it's faith-based, can continue. But the fact is, what's the point in this process if a ruling is not even recognized by the courts? It's a waste of time, firstly, and it's a waste of the court's time as well. There is a backlog of cases and there are a lot of financial expenditures there.

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Mr. Runciman: So it's been your experience that it's been a waste of time up to this point with respect to the process; it has been unofficial, if you will?

Ms. Ashraf: No. I'm saying that if we can decide a situation and resolve it through arbitration or mediation,

then yes. If we come to a proper and appropriate resolution, for me, to go to the courts would be a waste of time. If it's not legally recognized and you have to go through the whole process again, certainly.

Dr. Elmasry: I just want to add that the government is throwing away an opportunity here. You're right that Orthodox men and women in any faith—mostly Jewish—will still go because of their conviction that this will provide a healing, possible success and so on. In many cases, it will stop there and all parties to the dispute will be happy with either successful mediation or successful arbitration.

But this will actually be pre-1991 because we're back again to square one. So we're saying that there is an opportunity for the government to go a step farther, the same as it does with marriage, by working in partnership with this faith-based group, because we are also concerned about our women and their rights and the abuses.

Who told you that we don't care? Sure, we do care. If you pass this bill, you're really throwing away a historical opportunity to regulate and recognize what is good for Ontarians.

Mr. John Yakabuski (Renfrew–Nipissing–Pembroke): That's part of what I was going to talk about, the fact that mediation is still available to anyone under any circumstances. If disputes can be settled before arbitration, all the better.

However, one of the things that was brought forward to us previous to the legislation, as legislators but also through the public domain, was the express concern of groups within the Islamic community that sharia law would place women in particular in a grave position of disadvantage if that law were applied in arbitral situations. That probably was one of the reasons for bringing about the legislation. We have heard that as well from deputations at this committee hearing—very, very strong, emotional submissions that have been made on behalf of Muslim women here in Canada. I would like you to respond, if possible, to those very, very deeply expressed concerns.

Dr. Elmasry: I can't actually read your name there.

Mr. Yakabuski: John is good.

Dr. Elmasry: Okay. John, we share the same concern. The only thing is, the solution is different. What you're proposing is a solution by taking the checks and balances, throwing out the recognition and regulation of the process, and by saying that this is the best approach. I am submitting to you that this is the wrong approach, because if you're really concerned about women who will be forced into mediation and arbitration, you are not really solving it by this bill. You know that. The only way to do it is to regulate and recognize the arbitration process, put in checks and balances. If you give me the time—you don't have to pay me consultation fees—I can actually send you big checks and balances. The panel has to be licensed, all of them; a woman must be on the panel; there will be minutes of all the meetings in a mediation and an arbitration. Most of the checks and balances were actually in the report which was commissioned by an independent consultant to this government.

This means there is a way of doing it. That's what I'm saying. What's missing in the process is the political will to really face the issue and provide a solution. This is not a solution.

Mr. Kormos: Thank you very much for your participation. I just want to comment, Chair, that this has been a delight, to have been able to participate as a committee member, because the quality of submissions has been consistently high and the civility in the context of what is a very contentious issue has been remarkable and worthy of acknowledgement.

Let's face it, Mr. Yakabuski: A settlement—mediated or not—that is unjust is no more preferable than an award by an arbitrator or judge that is unjust. There's nothing inherently good about a settlement if the settlement is obtained through coercion, through power imbalance, through any number of factors that result in an unjust settlement. That's why I know Mr. Zimmer shares my passion for the comments of Owen Fiss in his article against settlements in the Yale Law Review, a copy of which I have provided.

Look, you talk about marriage and family having their origins in religion—that's a position, an opinion that's debatable—but surely the state has taken over. Same-sex marriage did not have its origins in the faith communities, at least not the traditional faith communities. The state determined.

So what I put to you is this: People can choose whatever relationships they want. If people want to have a relationship with somebody who is on the list of consanguinity, they can, as long as they don't go to a justice of the peace or somebody and try to get married. If people want to have two partners, they can, but the state doesn't recognize that. So the state does determine what constitutes marriage—hence family—from the state's point of view, although people are free to pick any way they want to do it. Why, then, should the state not be the sole source of authority for what dissolves or terminates a marriage or family in terms of the public law and the public courts?

I also am very conscious of the fact that, unfortunately, in the divorce act, divorces have been turned into mere judgments, which secularizes divorce and diminishes the quality of the intervention. Remember the old decree nisi and decree absolute? That was a far more significant legal recognition of the dissolution of a marriage.

If the state has the sole authority to determine what constitutes a legal marriage and legal families, why shouldn't the state have the sole authority in terms of enforceability? Once again, just like people can choose whatever type of family or relationship they want, they can choose whatever type of dispute resolution they want, but why should the state enforce anything other than a state-structured dissolution?

Ms. Ashraf: Briefly, the state is fully responsible for enforceability, and I'm simply going to say, the charter,

section 2(a) and article 27, because our recommendations fall right under those headings.

Mr. Kormos: But people can use whatever—Mr. Zimmer and I, whether we're in a commercial relationship or whatever type of relationship, can choose whatever style we want to end that relationship. Why should we then call upon the state to enforce a resolution that isn't in compliance with the state's public laws?

Dr. Elmasry: This is a wrong assumption. The assumption that is correct is that all matters of mediation and arbitration will be within Ontario law, exactly like marriage now. For example, a licensed marriage officiated in any faith has to respect the family law of the province—you know: a certain age, a man cannot marry another woman if he's married already, etc. This means that the final authority is within the government; there is no doubt about it. The same thing is involved in mediation and arbitration in the case of divorce. The ultimate arbitrator, if you like, is actually the government; it's not faith-based.

The Chair: Thank you very much for your delegation. We appreciate your being here today.

This brings to a close our hearings for the day—actually all of our hearings—and I'd like to thank the witnesses, the members and the committee staff for their participation. I'd like to remind all members that amendments to Bill 27 should be filed with the clerk of the committee by 5 p.m. today, as agreed to by the subcommittee. The committee now stands adjourned.

Mr. Kormos: On a point of order, Madam Chair: Number one, we simply want to encourage members of the committee to understand that the 5 p.m. deadline is advisory. Number two, Mr. Kaye, in a conversation I had with him—I appreciate his making best efforts to provide us with as much as he can in terms of bullet-point summaries of the submissions. If we could get those at some point today, it would be helpful to us and, more importantly, to legislative counsel.

We don't sit and write these amendments ourselves. Mr. Zimmer sat and typed out this legislation himself; I know he stayed up late, late at night. But we don't write our amendments; we rely on legislative counsel. In fairness to them, Mr. Kaye's collaboration is appreciated.

The Chair: That's been noted.

Mr. Yakabuski: Do we vote on that?

The Chair: No. I think Mr. Kaye has already shown initiative and provided some information, and we appreciate that he has.

This committee now stands adjourned until 10 a.m. on Wednesday, January 18, for clause-by-clause consideration of Bill 27.

The committee adjourned at 1141.

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